

**Council of City of New York v Carter**

2019 NY Slip Op 31953(U)

July 9, 2019

Supreme Court, New York County

Docket Number: 153498/2018

Judge: Melissa A. Crane

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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: MELISSA A. CRANE

PART 15

**HON. MELISSA A. CRANE** Justice  
**J.S.C.**  
COUNCIL OF CITY OF NEW YORK;  
RITCHIE J. TORRES; LAURIE A. CUMBO;  
ALICKA AMPRY-SAMUEL,

Petitioners,

- v -

INDEX NO. 153498/2018  
MOTION DATE \_\_\_\_\_  
MOTION SEQ. NO. 1  
MOTION CAL. NO. \_\_\_\_\_

ZACHARY W. CARTER, Corporation Counsel  
of the City of New York,

Respondent.

The following papers, numbered \_ to \_ were read on this motion to/for \_\_\_\_\_.

	<u>PAPERS NUMBERED</u>
Notice of Motion/Order to Show Cause — Affidavits — Exhibits ...	_____
Answering Affidavits — Exhibits _____	_____
Replying Affidavits _____	_____
CROSS-MOTION: YES NO	

HON. MELISSA CRANE, J.S.C.:

In February 2018, a NYCHA tenants' group and a non-profit organization filed an Article 78 proceeding in Supreme Court, New York County, alleging that NYCHA has violated federal and local law by failing to: (i) inspect for and remediate lead paint conditions, (ii) provide heat and hot water to tenants, (iii) provide economic and employment opportunities for tenants, and (iv) ensure that tenants are meaningfully involved in NYCHA operations (*see City-Wide Council of Presidents v. New York City Hous. Auth.*, Index No. 100283/2018 (Sup. Ct. N.Y. Cnty.) (the "CCOP Proceeding"))

On March 29, 2018, the General Counsel for the City Council formally requested that the Corporation Counsel, Respondent Zachery W. Carter, represent certain Council Members for purposes of filing an amicus brief in the CCOP Proceeding or, in the alternative, authorize the

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

Council Members to appear through outside counsel. It is undisputed that the Corporation Counsel withheld its approval (Memorandum of law in support of Respondent's cross motion to dismiss the petition (EDOC 22) at pg.15). This lawsuit followed.

Petitioners sought relief via two paths: (1) an Article 78 authorizing Petitioners to retain outside counsel to represent them in connection with the filing of an amicus brief in the CCOP Proceeding and (2) a declaratory judgment, pursuant to CPLR 3001, declaring that Council Members are entitled to retain outside counsel to represent them in their official capacities for purposes of filing amicus briefs, including whenever the Corporation Counsel refuses to provide representation. While defending this suit, the Corporation Counsel has clearly marked its territory, under the City Charter, that it is the only entity authorized to conduct the law business of the city.

This court heard oral argument on December 7, 2018 and took the motion on submission. While the motion was pending, the CCOP proceeding was discontinued. Concerned that the discontinuance of the CCOP proceeding would render any decision this court made on this Petition an impermissible advisory opinion, the court invited the parties to interpose additional letter briefs addressing the impact of the discontinuance. On July 1, 2019, both sides filed letter briefs outlining their respective positions. In its letter, petitioner concedes that the part of its application seeking relief via Article 78 is now moot (see EDOC 51). As to the request of a declaratory judgment, petitioner argues that a justiciable controversy remains because the Corporation Counsel (given its entrenched position) will almost certainly not approve members of the City Council as amici in the future.

“It is a fundamental principle of our jurisprudence that the power of a court to declare the law only arises out of, and is limited to, determining the rights of persons which are actually

controverted in a particular case pending before the tribunal. This principle, which forbids courts to pass on academic, hypothetical, moot, or otherwise abstract questions, is founded both in constitutional separation-of-powers doctrine, and in methodological strictures which inhere in the decisional process of a common-law judiciary” (*In re Hearst v Clyne*, 50 N.Y.2d 707, 714 1980 [citations omitted] )

Thus, generally, without the structure of an active case, a court cannot issue a declaratory judgment. To do so would mean rendering an advisory opinion which is prohibited CITE. However, an exception to the prohibition against advisory opinions can occur with the presence of three factors: “(1) a likelihood of repetition, either between the parties or among other members of the public; (2) a phenomenon typically evading review; and (3) a showing of significant or important questions not previously passed on, i. e., substantial and novel issues” (*Id.* at 715)

There can be no doubt that the substantive question of whether the City Council, or its particular members, in their official capacities, can appear as amicus in cases that effect their constituents, presents critical constitutional questions impacting the First Amendment and the doctrine of Separation of Powers. In addition, petitioners are correct that this dispute is likely to recur given the entrenched position of the Corporation Counsel. However, the second factor is absent, because this question is not one that would evade judicial review (*compare Community Board 7 of the Borough of Manhattan v Schaffer*, 84 NY2d 148, 154 [1994] [issue of whether community board had capacity to bring an Article 78 proceeding to enforce its rights under FOIL was not moot, despite that the information was no longer needed for that particular case, because of the relatively short time frame in which community boards had to carry out their responsibilities under the land use law).

Petitioners have not argued, nor can they, that the question they want a court to answer is one that will evade judicial review in the future. Rather, petitioners will have the opportunity the next time the Corporation Counsel fails to approve a proposed amicus. Here, there is no longer a case involving this circumstance. The cases petitioners cite are inapplicable. In all those cases, the case housing the controversy still existed. Here, it is gone. Thus, after consideration of the letter briefs and all the documents on the motion, the court finds it is constrained to dismiss this matter, because subsequent events have rendered advisory any decision this court would make.

Accordingly, it is

Ordered that the motion is denied, the cross motion granted, but only for the reasons stated herein, and the Petition is dismissed.

Dated: New York, New York  
July 9, 2019



JSC  
**HON. MELISSA CRANE**

**Dated:**

**ENTER:**